A **TAN SRI DATO' HJ LAMIN HJ MOHD YUNUS**

v.

BURSA MALAYSIA SECURITIES BHD & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
LINTON ALBERT JCA
C [CIVIL APPEALS NO: W-02-3683-2010, W-02-3684-2010 - W-02-3688-2010]
2 MARCH 2012

D ***COMPANY LAW:*** *Directors - Breach of director's duties - Breach of Bursa Malaysia's Listing Requirements (LR) - Whether director's duties under LR has statutory force - Whether director exonerated from duties by appointment of provisional liquidator - Whether director's duties continued by way of residuary obligations*

E The appellant was an Independent Non-Executive Director of Golden Plus Holdings Bhd ('GPlus'), a listed member and issuer of the respondent, Bursa Malaysia Securities Bhd. The respondent is a stock exchange which has a statutory duty to ensure an orderly and fair market in the securities traded through its facilities. *Vide* a court order dated 27 March 2008, a Provisional Liquidator F ('PL') was appointed for GPlus. Subsequently, on 18 July 2008, the respondent issued a notice to show cause to the appellant on the alleged breach of paras. 9.23(b), 9.23(a) and 9.22(1) of the respondent's Listing Requirements ('the LR') and required the appellant to make a written submission as to why the respondent G should not find the appellant to be in breach of paras. 16.11(a) and (b) of the LR. Upon deliberation by the Listing Committee, it was decided that the appellant had breached paras. 16.11(a) and/or (b) of the LR. The appellant appealed to the Appeals Committee. However, the Appeals Committee upheld the Listing H Committee's decision and meted out a public reprimand and imposed a fine on the appellant. The appellant applied for an order of *certiorari* to quash the decision of the Appeals Committee under O. 53 r. 4(1) and (2) of the Rules of the High Court 1980, but was dismissed by the High Court and hence this appeal. It was I contended by the appellant that with the appointment of the PL for GPlus, the appellant's duties including those under the LR were abolished or extinguished, in which case, only the PL was required to comply with the duties stated in the notice to show

cause. The issue for the court's determination was whether the appointment of the PL for GPlus exonerated the appellant from his duties to comply with the requirements of the respondent.

Held (dismissing the appeals with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The LR has statutory force in the form of rules containing obligations and requiring compliance by participating organisations pursuant to the Capital Markets and Services Act 2007. The appellant's duties under the LR are distinct and separate from his duties under the Companies Act 1965 ('the Act'). His duties under the LR being statutory in nature, were not displaced by the doctrine of frustration of contract. (paras 23 & 25)

(2) Section 233(1) of the Act, which provides for the legal implications consequent upon the appointment of a PL, does not either expressly or by necessary implication, provide for the abolition or extinguishment of the appellant's duties which existed before the appointment of the PL. The appellant's duties continued by way of residuary obligations. On the facts, the appellant and GPlus had, *inter alia*, continued to make various announcements for GPlus, confirmed the appellant's role requiring compliance with the LR and the appellant also had meetings with external auditors and had written to the respondent for extension of time to comply with the LR. In the circumstances, the appellant could not take the position that such prior duties were abolished or extinguished by virtue of the appointment of the PL. (paras 27, 28 & 29)

Bahasa Malaysia *Translations Of Headnotes*

Perayu merupakan Pengarah Bukan Eksekutif Golden Plus Holdings Bhd ('GPlus'), sebuah ahli yang disenaraikan dan penerbit responden, Bursa Malaysia Securities Bhd. Responden adalah bursa saham yang mempunyai kewajipan statutori untuk memastikan pasaran yang teratur dan adil dalam sekuriti yang dipasarkan melalui kemudahannya. Melalui perintah mahkamah bertarikh 27 Mac 2008, seorang pelikuidasi provisional ('PP') dilantik untuk GPlus. Kemudian, pada 18 Julai 2008, responden mengeluarkan notis tunjuk sebab kepada perayu atas dakwaan pelanggaran perenggan 9.23(b), 9.23(a) dan 9.22(1) Keperluan Penyenaraian ('KP') responden dan menyuruh perayu mengemukakan hujahan bertulis mengapa responden tidak boleh

memutuskan bahawa perayu telah melanggar perenggan 16.11(a) dan (b) KP. Selepas pertimbangan Jawatankuasa Penyenaraian, diputuskan bahawa perayu telah melanggar perenggan 16.11(a) dan/atau (b) KP. Perayu merayu kepada Jawatankuasa Rayuan. Walaubagaimanapun, Jawatankuasa Rayuan mengesahkan keputusan Jawatankuasa Penyenaraian dan melaksanakan teguran am dan mengenakan denda kepada perayu. Perayu memohon perintah *certiorari* untuk membatalkan keputusan Jawatankuasa Rayuan di bawah A. 53 k. 4(1) dan (2) Kaedah-Kaedah Mahkamah Tinggi 1980, tetapi telah ditolak oleh Mahkamah Tinggi dan maka itu rayuan ini. Perayu menghujah bahawa dengan pelantikan PP untuk GPlus, kewajipan perayu termasuk yang di bawah KP dimansuhkan atau dilenyapkan, yang mana, hanya PP sahaja yang perlu mematuhi tugas yang dinyatakan di dalam notis tunjuk sebab. Isu untuk pertimbangan mahkamah adalah sama ada pelantikan PP untuk GPlus melepaskan perayu daripada kewajipannya untuk mematuhi keperluan-keperluan responden.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) KP mempunyai kuasa statutori dalam bentuk peraturan-peraturan yang mengandungi kewajipan-kewajipan dan memerlukan pematuhan oleh organisasi yang mengambil bahagian menurut Akta Pasaran Modal dan Perkhidmatan 2007. Kewajipan perayu di bawah KP adalah berbeza dan berasingan daripada kewajipannya di bawah Akta Syarikat 1965 ('Akta'). Kewajipannya di bawah KP yang bersifat statutori, tidak diubah oleh doktrin kekecewaan kontrak.

(2) Seksyen 233(1) Akta, yang memperuntukkan implikasi dari segi undang-undang berikutan pelantikan PP, tidak secara langsung atau implikasi yang perlu, memperuntukkan pemansuhan atau pelenyapan kewajipan perayu yang wujud sebelum pelantikan PP. Kewajipan perayu berterusan sebagai tanggungjawab bakian. Di atas fakta, perayu dan GPlus telah, antara lain, meneruskan membuat berbagai pengumuman untuk GPlus, mengesahkan peranan perayu memerlukan pematuhan KP dan perayu juga mengadakan mesyuarat-mesyuarat dengan auditor-auditor luar dan telah menulis kepada responden untuk lanjutan masa untuk mematuhi KP. Dalam keadaan tersebut, perayu tidak boleh mengambil kedudukan bahawa kewajipan terdahulu sebegitu telah dimansuhkan atau dilenyapkan dengan pelantikan PP.

Legislation referred to:
Capital Markets and Services Act 2007, s. 11
Companies Act 1965, s. 233(1)
Rules of the High Court 1980, O. 53 r. 4(1), (2)

For the appellant - Maniam Raju; M/s Krish Maniam & Co
For the respondent - Lim Chee Wee (Kwan Will Sen with him); M/s Skrine

Reported by S Barathi

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] This appeal raises a question of law of immense importance to the corporate community in general, and the capital markets and services in particular.

[2] On 2 October 2009, the Respondent's Appeals Committee upheld the decision of its Listing Committee and meted out a public reprimand and imposed a fine of RM17,200 on the appellant ("the Director") for breaching Bursa Malaysia's Listing Requirements ("the LR"). (A reference hereinafter to a paragraph is a reference to that paragraph in the LR).

[3] The Director then took out a notice of motion under O. 53 r. 4(1) and (2) of the Rules of the High Court 1980 for judicial review to issue an order of *certiorari* to quash the decision of the Appeals Committee.

[4] The learned judge of the High Court dismissed the said notice of motion. Hence, this appeal by the Director against the High Court decision.

[5] Parties have agreed that the outcome of this appeal shall bind five other appeals *viz.* W-02-3684 to 3688-2010 now before us (collectively, "the Appeals").

Factual Background

[6] The factual background leading to the instant appeal is not in dispute.

[7] On 28 June 2006, the Director was appointed as an Independent Non-Executive Director of Golden Plus Holdings Bhd ("GPlus"), a listed member and issuer of the respondent, Bursa Malaysia Securities Bhd ("Bursa Malaysia").

[8] Bursa Malaysia is a public company incorporated under the Companies Act 1965 and is a Stock Exchange. Under s. 11 of the Capital Markets and Services Act 2007, Bursa Malaysia has a statutory duty to ensure an orderly and fair market in the securities traded through its facilities. For this purpose, Bursa Malaysia issues, monitors and enforces various rules, regulations and requirements, including the LR, to bind its members and the members' directors.

[9] *Vide* court order dated 27 March 2008, a Provisional Liquidator ("PL") was appointed for GPlus.

[10] On 18 July 2008, Bursa Malaysia issued a Notice To Show Cause to the Director, alleging the following breaches:

(1) Under paragraph 9.23(b), for failing to submit GPlus' annual audited accounts for the financial year ended 31 December 2007 ("AAA 2007") on or before 30 April 2008. This was only submitted on 21 August 2008;

(2) Under paragraph 9.23(a), for failing to submit GPlus' annual report for the financial year ended 31 December 2007 ("AR 2007") on or before 30 June 2008. This was only submitted on 28 August 2008;

(3) Under paragraph 9.22(1), for failing to submit GPlus' quarterly report for the financial period ended 31 March 2008 ("QR 1/2008") on or before 31 March 2008. This was only submitted on 3 September 2008; and

(4) Under paragraph 9.22(1), for failing to submit GPlus' quarterly report for the financial period ended 30 June 2008 ("QR 2/2008") on or before 31 August 2008. This was only submitted on 9 October 2008.

[11] Paragraph 16.11 expressly provides that a director of a listed issuer must not:

(a) cause, aid or abet a breach of the LR by such listed issuer; or

(b) permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of the LR.

[12] The Director was required to show cause by making a written submission supported by documentary evidence, if any, to Bursa Malaysia as to why Bursa Malaysia should not find the Director to be in breach of:

(a) Paragraph 16.11(a), for causing the company's failure to submit:

(i) the AAA 2007;

(ii) the AR 2007;

(iii) the QR 1/2008; and

(iv) the QR 2/2008;

and/or

(b) Paragraph 16.11(b), for permitting, either knowingly or where the Director has reasonable means of obtaining such knowledge, the company's failure to submit:

(i) the AAA 2007;

(ii) the AR 2007.

(iii) the QR 1/2008; and

(iv) the QR 2/2008

[13] On 12 February 2009, the Listing Committee deliberated, and, on 25 March 2009, decided, *inter alia*, that the Director had breached paragraph 16.11(a) and/or (b).

[14] Against the decision of the Listing Committee, the Director *vide* solicitors' letters dated 2 and 3 April 2009 appealed to the Appeals Committee.

[15] On 2 October 2009, the Appeals Committee dismissed the Director's appeal.

[16] Subsequently, the Director's Notice of Motion for judicial review was dismissed by the High Court.

[17] The Director's Appeal against the High Court decision is now before us.

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Question For Determination

[18] For the purpose of obtaining an order for judicial review in the court of first instance, learned counsel for the Director and Bursa Malaysia had focused their respective submissions on
B contract, corporate and company law, in particular, relating to the appointment of the PL, consequential legal implications, contractual rights and obligations of the Director as well as frustration of contract.

C **[19]** To elaborate, learned counsel Mr Maniam Raju submitted for the Director that with the appointment of the PL for GPlus, the Director's duties including those under the LR are abolished or extinguished, in which case, only the PL is required to comply with the duties stated in the Notice to Show Cause.

D **[20]** Mr Lim Chee Wee (Mr Kwan Will Sen with him) responded that the Director's duties under the LR subsisted notwithstanding the appointment of the PL.

[21] The learned High Court Judge considered wholly and
E exclusively the aforesaid submissions and, on those premises, agreed with the views ventilated for Bursa Malaysia and dismissed the Director's application.

[22] Having carefully considered the grounds of judgment of the
F learned judge and counsel's respective submissions, we identify the Question for determination as follows:

> Does the appointment of the PL for GPlus exonerate the Director from the Director's duties (which existed before the said appointment) to comply with the requirements of Bursa Malaysia
G set out in para 16.11(a) and (b) read with para 9.23(b) relating to the submission of annual audited accounts for GPlus; para 9.23(a) relating to the submission of annual report; and para 9.22(1) relating to the submission of quarterly reports?

[23] At the outset, we must stress that the LR has statutory
H force in the form of rules containing obligations and requiring compliance by participating organizations pursuant to the Capital Markets and Services Act 2007.

[24] The Director's duties are set out generally in the LR, and in
I para 2.04(2) specifically ie, "A listed issuer, … its directors … must comply with these Requirements for so long as the listed issuer shall remain on the official list. This applies even during periods

when a listed issuer's securities are suspended from trading." These duties are owed not only to Bursa Malaysia but also to the investing public.

[25] The Director's duties under the LR are distinct and separate from his duties under the Companies Act 1965. His duties under the LR, being statutory in nature, are not displaced by the doctrine of frustration of contract. Such doctrine may apply to GPlus and the Director *inter se*, but is inapplicable to the Director's statutory duties under the LR.

[26] In this regard, we are mindful of s. 233(1) of the Companies Act 1965 which in essence provides for the legal implications consequent upon the appointment of eg, a provisional liquidator. It reads as follows:

> **Custody and vesting of company's property**
>
> 233(1) **Where** a winding up order has been made or a **provisional liquidator has been appointed, the** liquidator or **provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.** (emphasis added)

[27] Upon a true construction of s. 233(1), it is abundantly clear to us that it does not, either expressly or by necessary implication, provide for the abolition or extinguishment of the Director's duties which existed before the appointment of the PL. The Director's duties continue by way of residuary obligations. In these appeals, the facts reveal that the Director(s) and GPlus had actually continued to make various announcements for GPlus. Pursuant to letters dated 29 May 2008, 25 July 2008 and 19 September 2008, the Director(s) and GPlus confirmed the Director's role requiring compliance with the LR. The Director(s) had meetings with external auditors and indeed wrote to Bursa Malaysia on 29 April 2008 and 22 May 2008 for extension of time to comply with the LR.

[28] In the circumstances, the Director cannot take the position that such prior duties are abolished or extinguished by virtue of the appointment of the PL. In other words, the appointment of the PL does not exonerate the Director from his duties prescribed in the LR.

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Conclusion

[29] On the foregoing grounds, we answer the above Question in the negative. We hold that the learned judge was correct in her decision. We find no merits in these appeals which we hereby
B dismiss with costs of RM10,000 in respect of each appeal, amounting to a global sum of RM60,000 for the six appeals.

[30] Decision of the High Court is affirmed.

[31] Deposit to Bursa Malaysia (respondent) on account of the
C fixed costs.

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